

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DOUGLAS EARL MEYER,

Plaintiff,

v.

MICHAEL WILSON,

Defendant.

No. CV-11-5138-RHW

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND MOTION TO  
STRIKE**

Before the Court are Plaintiff's Motion for Summary Judgment and Motion to Strike, ECF Nos. 36, 51. In the first motion, Plaintiff moves for summary judgment arguing that Defendant's conduct violated his Fourth Amendment rights during an illegal search and seizure of his home that occurred on October 20, 2009.<sup>1</sup> Plaintiff submitted a Memorandum in Support, ECF No. 39, and a Statement of Undisputed Facts in Support, ECF No. 40. In response, Defendants submitted a Memorandum in Opposition, ECF No. 43, Objections and Statement of Facts in Opposition, ECF No. 44, and a Declaration of Michael Wilson with two exhibits attached, ECF No. 45. Plaintiff has also replied, ECF No. 50.

In his second motion, Plaintiff moves to strike the Defendant's Answer, Defenses, and Affirmative Defenses to Plaintiff's Third Amended Complaint, ECF No. 49, pursuant to FED R. CIV. P. 12(f). In opposition to the motion to strike, Defendant has responded, ECF No. 52. These motions were heard without oral

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<sup>1</sup> For a detailed account of the facts in this case, *See* ECF No. 25 at 1-4.

1 argument. The Court is fully informed, having reviewed all documents in support  
2 of, and in opposition to, the motions. Based on the reasons set forth below, the  
3 instant motions are denied.

## 4 **PROCEDURAL BACKGROUND**

5 On October 3, 2011, Plaintiff filed a § 1983 action against Defendants  
6 Michael Wilson and Dan McCary. ECF Nos. 1, 4. Plaintiff asserted that his  
7 Constitutional rights were violated by (1) illegal police public disclosure; (2)  
8 illegal search and seizure (3) illegal incarceration, and (4) conspiracy to violate his  
9 constitutional rights and deny him his right to seek legal redress. *Id.*

10 On August 21, 2012, the Court granted, in part, Defendant's Motion to  
11 Dismiss. *See* ECF No. 25. The Court found Count Two stated a claim for illegal  
12 search and seizure, but Counts One, Three, and Four failed to state a claim, and  
13 were dismissed. In his Third Amended Complaint, ECF No. 31, filed on September  
14 26, 2012, Plaintiff amended the conspiracy claim alleged in the prior complaint, as  
15 permitted by the Court. On January 17, 2013, however, the Court granted  
16 Defendant's motion to dismiss this claim as well, and dismissed Defendant  
17 McCary. ECF No. 48. Plaintiff now moves the court for summary judgment as to  
18 his second claim, for unreasonable search and seizure, and to strike Defendant's  
19 Answer to the Third Amended Complaint, ECF No. 31.

## 20 **I. LEGAL STANDARD**

### 21 **A. Summary Judgment**

22 Summary judgment is appropriate when the moving party demonstrates  
23 there are no genuine issues as to any material fact. FED. R. CIV. PRO. 56(c). The  
24 moving party must first inform the court of the basis for its motion and identify the  
25 portions of the affidavits, pleadings, and discovery that demonstrate an absence of  
26 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
27 (1986). A fact is "material" if it might affect the outcome of the suit under the

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governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A dispute is “genuine” as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* at 248. If the moving party meets its initial burden, the “burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

## **B. Motion to Strike**

Rule 12(f) provides that a federal court may strike from the pleadings any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. FED. R. CIV. P. 12(f). The function of a motion to strike is to avoid the unnecessary expenditures that arise throughout litigation by dispensing of any spurious issues prior to trial. *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Rule 12(f) motions “are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic.” *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). Thus, courts generally grant a motion to strike only where “it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.” *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992).

## **II. DISCUSSION**

### **A. Plaintiff’s Motion for Summary Judgment**

In a summary judgment motion, the moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex*, 477 U.S. at 325.

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1 This motion must be supported with citations to the record. FED. R. CIV. P.  
2 56(c)(1)(A). If citing to affidavits, it must “be made on personal knowledge, set out  
3 facts that would be admissible in evidence, and show that the affiant or declarant is  
4 competent to testify on the matters stated.” FED. R. CIV. P. 56(c)(4). A written,  
5 unsworn statement may substitute for an affidavit if it is subscribed as true under  
6 penalty of perjury. *See* Advisory Committee Note on 2010 Amendment to  
7 subdivision (c) of Rule 56.

8 “A district court does not have a duty to search for evidence that would  
9 create a factual dispute.” *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007)  
10 (*citing Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)). As  
11 the Ninth Circuit recognized, it would be “unfair” to the district court to require it  
12 “to search the entire record” if a party fails to “disclose where in the record the  
13 evidence for [the factual claims] can be found”. *Id.* If a party fails to meet its initial  
14 responsibility of informing the district court of the basis for its motion and  
15 establishing the absence of genuine issues of material facts, summary judgment  
16 must be denied. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) (*citing*  
17 Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56).

### 18 **1. Plaintiff’s Evidentiary Support**

19 At this point in the proceedings, Plaintiff cannot rely solely upon the  
20 allegations contained in his motion for summary judgment. *See Rivera v. National*  
21 *R.R. Passenger Corp.*, 331 F.3d 1074, 1079 (9<sup>th</sup> Cir. 2003) (noting that conclusory  
22 allegations made in the complaint and in declarations unsupported by independent  
23 evidence cannot create genuine issues of material fact).

24 To support his motion, Plaintiff submits a “Statement of Undisputed Facts in  
25 Support of Motion for Summary Judgment.” ECF No. 40. This Statement is  
26 simply a collection of factual assertions made by Plaintiff from his personal  
27 knowledge. It is not a formal affidavit or declaration. Nor is it an unsworn

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1 document that has been subscribed as true under the penalty of perjury. Thus, this  
2 statement is not admissible as evidence and may not be used to support the  
3 summary judgment motion.

4 Plaintiff's only admissible evidence in support of his motion is the  
5 "Declaration of Tammy Lee Rose in Support of Motion to Suppress," filed  
6 originally in Benton County Superior Court on November 30, 2010. *See* ECF No.  
7 4, App. F. This declaration was attached to Plaintiff's original complaint and  
8 labeled "Appendix F". *Id.* Although the Declaration may meet the technical  
9 requirements under Rule 56, it is questionable whether Plaintiff's passing  
10 references are sufficient to even meet the moving party's initial burden to present  
11 evidence of an absence of material fact. It is not for the court to search for the  
12 evidence; it should be presented to the court along with the relevant motion.  
13 Because Plaintiff failed to support his motion with admissible evidence, he has  
14 failed to meet the initial burden showing an absence of material fact and the  
15 motion is denied on this basis.

16 However, assuming arguendo that Plaintiff met his initial burden, the Court  
17 denies the instant motion on an alternative basis as well. Defendant has  
18 demonstrated genuine issues of material fact regarding consent that await  
19 resolution at trial. This issue is considered briefly below.

## 20 **2. Genuine Issues of Material Fact Remain Regarding Consent**

21 Plaintiff asserts in his "Memorandum in Support of Plaintiff's Motion for  
22 Summary Judgment," ECF No. 39, that Defendant Wilson bullied his way into  
23 Plaintiff's home. Plaintiff claims this fact is undisputed, based on the current  
24 record, and moves for summary judgment on the issue of qualified immunity  
25 regarding Defendant Wilson.

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1 In response, Defendant submitted a “Memorandum in Opposition to  
 2 Summary Judgment,” ECF No. 43, along with the “Declaration of Michael Wilson  
 3 in Support of Defendants’ Memorandum in Opposition to Plaintiff’s Motion for  
 4 Summary Judgment,” ECF No. 45. Defendant Wilson declares under penalty of  
 5 perjury that Plaintiff’s roommate, Ms. Rose, invited him into the home to look for  
 6 the Plaintiff and at no time did he bully her into permission to enter the home. ECF  
 7 No. 45 at 1-3. Whether Ms. Rose invited Defendant into her home, or whether he  
 8 pressured her, as she claims in her Declaration dated Nov. 30, 2010, ECF No. 4, is  
 9 a fact still unresolved. Further, this is a material fact that directly affects the  
 10 outcome of Plaintiff’s remaining Fourth Amendment claim, because resolution of  
 11 the issue turns on whether there was valid, uncoerced, consent. *See, e.g., United*  
 12 *States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997).

13 Moreover, in a summary judgment motion, all conflicts of testimony are  
 14 resolved in favor of the nonmoving party. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.  
 15 871, 888 (1990) (noting “where the facts specifically averred by [the nonmoving  
 16 party] contradict facts specifically averred by the movant, the motion must be  
 17 denied”). For the purposes of this motion, the Court must take Defendant’s sworn  
 18 statement that he was invited into the home as true. Consequently, a jury could find  
 19 in Defendant’s favor and that consent was freely given. Since Defendant has  
 20 produced sufficient evidence contradicting Plaintiff’s evidence, there remain issues  
 21 of material fact to be resolved at trial. Summary judgment is not proper.

22 Finally, Plaintiff contends that the search was invalid because Defendant  
 23 Wilson failed to provide the necessary constitutional warning (the Court assumes  
 24 this references a *Ferrier*<sup>2</sup> warning). ECF No. 39. Plaintiff asserts this is an  
 25 undisputed fact and, thus, summary judgment is proper. Regardless of the veracity  
 26 of that fact, Defendants correctly argue that whether consent was voluntary or the

27 <sup>2</sup> *See State v. Ferrier*, 136 Wn.2d 103 (1998).

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1 product of duress is to be determined from the totality of all the circumstances  
2 citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 277. A warning under *Ferrier* is  
3 only one of the factors for a jury to consider in determining whether a search was  
4 voluntary or the product of duress or coercion -- and in no way would be  
5 dispositive of this case.

6 Even if Plaintiff had supported his motion with admissible evidence on this  
7 issue, the motion would still be denied as genuine issues of material fact remain to  
8 be tried in this case. Therefore, summary judgment is not proper.

### 9 **3. Qualified Immunity**

10 The Court also notes that the issue of whether Defendant is entitled to  
11 qualified immunity was first presented by Plaintiff in his "Memorandum in  
12 Support of Plaintiff's Motion for Summary Judgment." ECF No. 39 at 7-10. The  
13 Plaintiff also included argument regarding this issue in his Reply. *See* ECF No. 50  
14 at 7-10. Plaintiff asks the Court to grant summary judgment and hold that  
15 Defendant is not entitled to a qualified immunity defense. The Court declines to do  
16 so. Any discussion of this issue by Plaintiff before Defendant has briefed this issue  
17 is premature, and will not be considered herein. Instead, the Court will wait for  
18 Defendant's own motion for summary judgment, which has yet to be filed.

### 19 **B. Plaintiff's Motion to Strike**

20 Plaintiff also moves the Court to strike Defendant's Answer to the Third  
21 Amended Complaint under Rule 12(f). ECF No. 51. Specifically, he contends that  
22 Defendant's arguments are redundant. *Id.* at 1. After reviewing Defendant's  
23 Answer, Defenses, and Affirmative Defenses to Plaintiff's Third Amended  
24 Complaint, ECF No. 49, the Court is unable to find any insufficiently pled  
25 defenses or any redundant, immaterial, or impertinent matter that would warrant  
26 striking the pleading. *See* FED R. CIV. P. 12(f).

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